COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023880-01**

Richard Brackett	Employee
Modern Continental Constr. Co.	Employer
National Union Fire Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Carroll and Costigan)

APPEARANCES
Ronald L. St. Pierre, Esq., for the employee
Shawn F. Mullen, Esq., for the insurer

HORAN, J. The insurer appeals from a decision in which an administrative judge awarded the employee ongoing partial incapacity benefits for a cumulative injury to his wrist. The insurer requests a reversal; we conclude that recommittal is appropriate and necessary.

The employee, a union carpenter since 1968, began to experience wrist pain while working from 1995 to 1996. The pain worsened over the next several years, ultimately causing the employee to leave work on June 1, 2001. He remains out of work. The insurer denied the employee's claim for workers' compensation benefits, but the administrative judge awarded total incapacity benefits at conference. The insurer appealed that order to a hearing de novo. (Dec. 76-77.) At hearing, the insurer raised § 1(7A) in defense of the employee's claim, although this was not mentioned in the decision. (Ex. 2, Insurer's Issues Sheet.)

The employee underwent a § 11A impartial medical examination by Dr. John Ritter on August 2, 2002. (Dec. 78.) Dr. Ritter did not believe the employee had suffered a work-related injury to his wrists or hands, opining instead that the employee's diagnosis of generalized osteoarthritis of the hands was pre-existing, and unrelated to any work injury. (Ex. 3, Impartial Report.) At his deposition, Dr.

Ritter addressed the employee's allegation of work-related cumulative trauma, but did not feel the employee's work activity was a major cause of his condition.[1] The doctor opined the employee was partially disabled, and restricted him from work requiring heavy lifting, pushing, pulling, or repetitive use of the hands. (Dep. 7-8.)

The judge declared the impartial report inadequate at the hearing; however, in his decision, he found that "the doctor's report and deposition together constituted adequate impartial medical evidence within the meaning of § 11A."[2] (Dec. 78; Tr. 67.) He also concluded the employee remained partially incapacitated due to his work-related injury. (Dec. 79.) The judge awarded a closed period of § 34 benefits, and ongoing § 35 benefits. (Dec. 80-81.) The judge failed to acknowledge the § 1(7A) issue.

The insurer argues the hearing decision should be reversed because the judge misinterpreted the medical evidence of the impartial physician, whose opinion, the insurer insists, did not satisfy the § 1(7A) causation standard. In the alternative, the insurer argues the case should be recommitted for further findings on that issue.

We agree the judge erred in failing to address the § 1(7A) issue. However, our disposition is based chiefly upon our conclusion that the judge's handling of the § 11A medical evidence, including the employee's motion, resulted in a violation of the employee's due process right to present his medical case.[3]

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[1] The doctor would only concede the employee's work was a major cause of his subjective complaints, but not his disability.

[2] The judge, therefore, allowed only so much of the employee's motion for a declaration of inadequacy relative to the pre § 11A examination "gap" period of disputed *incapacity*. Accordingly, the "gap" medical evidence was not admitted to address the § 1(7A) issue. (Dec. 78.)

[3] We recognize the employee did not cross-appeal. This is understandable, as he prevailed to some degree on his claim for benefits. Nonetheless, because we view the judge's error in this case as indicative of such a fundamental misunderstanding of the procedural aspects of § 11A, we are compelled to address this important issue.

G. L. c. 152, § 11A; See O'Brien's Case, 424 Mass. 16 (1997).

The record reveals that argument on the employee's motion to declare Dr. Ritter's report inadequate resulted in a twenty-two-page colloquy among the participants. Finally, the judge declared the report inadequate, due to the doctor's failure to comment on causation in a cumulative trauma context. (Tr. 67.) If the judge had stopped there, and permitted the introduction of additional medical evidence from both parties, he would have complied with the plain language and meaning of § 11A. Either party could then, as of right and at their expense, depose any of the medical experts involved in the case. G. L. c. 152, § 11A; see Begin's Case, 354 Mass. 594, 597 (1968)(error to limit a party's cross-examination right at deposition). Instead, the judge urged the parties to "cure" the inadequacy of the report by deposition: "So if there is no deposition, the report is inadequate. If there is a deposition, it may still be inadequate or it may not be inadequate." (Tr. 70.) The judge then informed counsel that, despite his favorable ruling on the motion, he would *not* presently accept additional medical evidence. (Tr. 71.) He then asked the parties to depose Dr. Ritter in an attempt to cure the inadequacy of his report.[4] (Tr. 71.) Once insurer's counsel agreed to do so, the judge declared that upon review of the deposition transcript, he reserved the right to change his ruling on the employee's motion. (Tr. 71-72.)

Nothing in § 11A, or in G. L. c. 152, authorizes a judge to force a party to take a deposition to "cure" an inadequate impartial medical report.[5] As we have

[4] It appears the judge wanted *insurer's* counsel to ask the doctor about the cumulative effect the employee's work as a carpenter would have had on the underlying and pre-existing medical condition. This placed insurer's counsel in the awkward position of "curing" an inadequate report by asking questions on causality that, if answered in the affirmative, would make the *employee's* case.

[5] Counsel for the employee correctly maintained his position that he could not be compelled to depose Dr. Ritter once the impartial report was declared inadequate. (Tr. 20-21, 69-70.) The parties agreed, at oral argument, that employee's counsel possessed, at the time he advanced his motion, medical evidence which, if credited, would have satisfied the applicable causation standard.

previously held, "when the § 11A *report* is inadequate as a matter of law, as it was here, neither party should be forced to depose the impartial physician to correct or cure the inadequacy. In this limited circumstance, due process *requires* that additional medical evidence be allowed." LaGrasso v. Olympic Delivery Serv. Inc., 18 Mass. Workers' Comp. Rep. 48, 57 (2004)(emphasis in original). And let us be clear: Dr. Ritter's report *was* facially inadequate for the very reason stated by the judge.[6] Nowhere did the doctor comment on the cumulative trauma theory of the employee's claimed disability. An impartial physician's failure to offer an opinion on a litigated theory of causation constitutes an inadequacy that mandates the introduction and consideration of additional medical evidence under § 11A. See Stevens v. Northeastern Univ., 11 Mass. Workers' Comp. Rep. 167, 169, 173 (1997)(§ 11A physician did not opine on cumulative injury theory warranting recommittal for admission of additional medical evidence); Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 645 (1995)(§ 11A opinion that does not respond to contested medical issues is clearly inadequate, requiring additional medical evidence); cf. Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 401 (1998)(judge's erroneous sustaining of objections to questions on impartial physician's opinion regarding cumulative injury reversed; case recommitted).

Section 11A is clear in its specific imposition of the judge's power, sua sponte, to ensure the impartial medical report addresses the factors enumerated therein. O'Brien's Case, 424 Mass. 16, 22-23 (1997)("[I]n any case, where these procedures still failed to offer a party an opportunity to present testimony necessary to present fairly the medical issues, then there might well be a failure of due process as applied in that case"). In this case, because the employee moved

[6] We note the report also failed to address the § 1(7A) causation standard.

for a declaration of inadequacy, and attempted to introduce other medical evidence in support of his claim, the O'Brien due process issue was clear.[7]

> We read G. L. c.152, §11A, to mean what it says:
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> The report of the impartial examiner shall be admitted into evidence at the hearing. Either party shall have the right to engage the impartial medical examiner to be deposed for purposes of cross-examination. Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony *when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner*.

(Emphasis added.) The statute plainly requires the judge to rule on the "inadequacy of the report," not on the doctor's deposition testimony. Once the judge found the report inadequate, he was obligated to admit additional medical evidence.[8] Therefore, the judge's ultimate decision -- that someone[9] was obligated to take Dr. Ritter's deposition and attempt to cure the inadequacy of the report --

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[7] An administrative judge's wide discretion to handle impartial medical evidence does not mean he may ignore a timely motion challenging a § 11A report's adequacy, or rule favorably on such motion and simultaneously refuse to entertain the evidence proffered.

[8] Cf. Viveiros' Case, 53 Mass. App. Ct. 296, 300 (2001)(administrative judge not required to, sua sponte, admit additional medical evidence where parties fail to present a motion challenging the adequacy of the § 11A report).

[9] If left to their own thoughts and strategy, neither party would, ordinarily, depose the impartial doctor under these circumstances. Employee's counsel would be wise to submit his own medical evidence, knowing, without further risk and expense, that his prima facie case would be made. The insurer would, also, rely more certainly on its own evidence, cognizant of the impartial report's failure to provide a legally sufficient opinion on an essential element of the employee's case, and thereby avoid the risk of giving the employee an opportunity to cure that defect by sponsoring the doctor's deposition. Here, the latter event is exactly what transpired. The insurer sponsored Dr. Ritter's deposition, the administrative judge misconstrued the deposition testimony, and then he awarded benefits (which, for the most part, explains the employee's failure to appeal).

was contrary to the plain meaning of § 11A.[10] See McDonough's Case, 440 Mass. 603, 608 (2003)(general policy-oriented interpretation "may not trump the plain language and purpose of the statute").

Accordingly, with the following important limitation, we recommit the case for the introduction of additional medical evidence on all medical issues, and for further findings consistent with this opinion. Because the employee did not appeal the hearing decision, he may not, on recommittal, be awarded benefits at a higher rate for the time period preceding the close of the evidence. See Fay v. Federal Nat'l Mtge. Ass'n., 419 Mass. 782, 789 (1995)("failure to take a cross appeal precludes a party from obtaining a judgment more favorable to it than the judgment entered below"); Galindez v. International House of Pancakes, 12 Mass. Workers' Comp. Rep. 214 (1998)(same); see also G. L. c. 152, § 16.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: January 13, 2005

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Patricia A. Costigan
Administrative Law Judge

[10] Therefore, it was also contrary to law. G. L. c. 152, § 11C.